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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

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JAMES H. McKENNEY,
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HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 81.

Brief for Defendant in Error.

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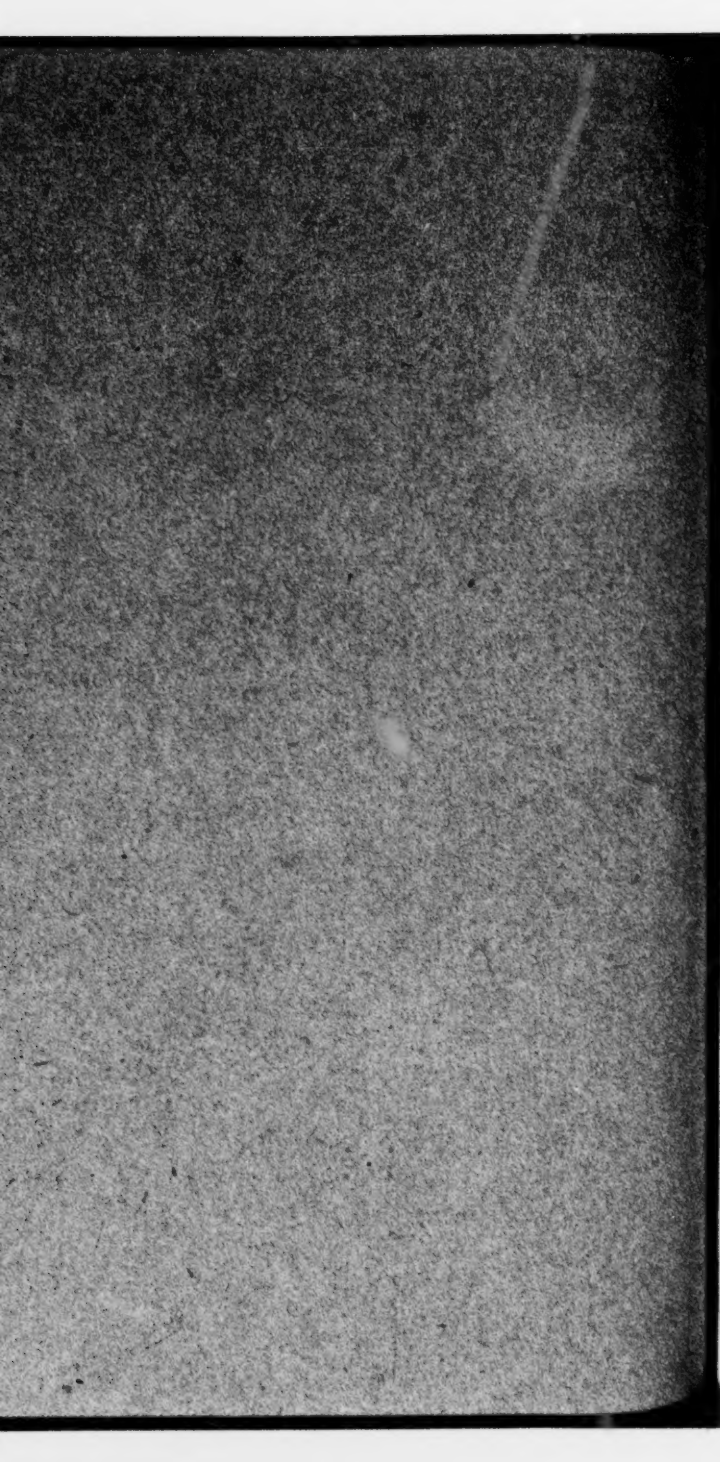

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STATEMENT OF FACTS.

The statement of the case by the plaintiff in error fully covers the substantial matters necessary for a full general understanding of the questions involved in this appeal, and we will add nothing thereto.

We can not conceive how the exordium of plaintiff in error's brief has any place in a brief in this honorable court, but it is so misleading in all of its parts we feel that it should not go unchallenged. The law was drawn by the

then attorney-general of the state upon the almost universal demand of the small real estate owners. It was never a political question, both parties as the records show, supporting it, it passed the senate on a vote of 28 to 17 and the house by a vote of 84 to 4 or in a total of 133 votes cast, the "narrow majority" was 89.

Not a single court in the state outside of the Marion circuit court ever held the law unconstitutional nor has the constitutionality of the law ever been questioned in any other court of the state that has come to the knowledge of the legal department of the state. The writer of this brief has been an assistant in the office of the attorney-general of the state continuously since the passage of the act in question. Hundreds of letters have been received from all over the state asking for instructions and interpretations of the law, but not one was ever received by the legal department questioning its constitutionality, as is shown by the records of said office.

Of the ninety-two county auditors in the state all except the plaintiff in error endeavored to faithfully obey it and perform their duties under it, as is shown by the records in the auditor of state's office, and there was no confusion outside of Marion county until this suit was brought and the judge of the circuit court decided the law unconstitutional.

As to the effect upon the valuation of assessable property, plaintiff in error is auditor of the county and he knows or can easily know that the total assessed valuation in Marion county, as shown by the settlement sheets in the auditor of

state's office made by plaintiff in error for the year of 1898, before that law was passed, was $141,335,225, that for the year 1900, the assessed valuation of Marion county, less the mortgage deductions was $145,939,405, or $4,604,180 more than 1898, for the years of 1901 and 1902 the deductions were not made until the decision in this case by the supreme court, so that the increase in the tax rate can not be attributed to the decrease in taxables.

The law is a popular law with the masses, and only obnoxious to those mortgage holders whose mortgages have been uncovered by the affidavits of the mortgagors and placed upon the tax duplicates by the county assessors of the several counties and made to bear their share of the burdens of government.

THE DECISIONS OF THE HIGHEST STATE COURT ON STATE CONSTITUTIONS AND STATUTES ARE CONTROLLING IN THIS COURT.

Under the rules of this court the decision of the supreme court of Indiana, sustaining the validity of the statute in question is controlling as to any question of conflict between it and the state constitution, and all of those parts of plaintiff in error's brief that undertake to attack the law, except in so far as it is repugnant to the federal constitution, is irrelevant.

In the case of Adams Express Company v. Ohio, 165 U. S. 194, on page 219, Chief Justice Fuller, speaking for the court, says:

> "The contention that the act in question is invalid, because repugnant to the constitution of the

> state of Ohio, has been disposed of by the decision of the highest tribunal of that state, sustaining its validity. State v. Jones, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling."

In the case of Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, on page 688, Mr. Justice Brewer, speaking for the court, says:

> "So far as respects any mere matter of procedure, or of conflict between the statute authorizing the condemnation or the proceedings had thereunder and the constitution of the state, the decision of the court of appeals is conclusive. West River Bridge Company v. Dix, 6 How. 507; Bucher v. Cheshire Railroad, 125 U. S. 555; Adams Express Company v. Ohio, 165 U. S. 194. Our inquiry must be directed to the question whether any rights of the water supply company secured by the constitution of the United States have been violated."

In the case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, on page 462, Mr. Justice Brewer, speaking for the court, says:

> "It is sufficient to say, in reference to this contention, that the decision of the supreme court of the state of Pennsylvania, sustaining the statute, is conclusive in this court as to any question of conflict between it and the state constitution."

Citing—

West River Bridge Co. v. Dix, 6 How. 507;
Bucher v. Cheshire Railroad, 125 U. S. 555;
Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232;
Lewis v. Monson, 151 U. S. 545;
Adams Express Co. v. Ohio, 165 U. S. 194;
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

In the case of Rasmussen v. Idaho, 181 U. S. 198, on page 200, Mr. Justice Brewer, speaking for the court, says:

> "The judgment of the supreme court of Idaho establishes that there is no conflict between this legislation and the constitution of the state, and it is not within the province of this court to review that question. Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, and cases cited in the opinion.
>
> "The single question, therefore, for our consideration, is whether this legislation conflicts with the federal constitution."

In the case of Williams v. Parker, 188 U. S. 491, on page 502, Mr. Justice Brewer, speaking for the court, says:

> "That the statute does not conflict with the constitution of the state is for this court settled by the decision of the state court."

So, under the foregoing authorities, it is clear that unless plaintiff in error can show to this court that the act in

question abridges the privileges or immunities of citizens of the United States, or deprives any person of life, liberty or property, without due process of law, or denies to any person within its jurisdiction the equal protection of the laws, he must fail in this appeal.

DOES THE PLAINTIFF IN ERROR PRESENT ANY QUESTION FOR THE DETERMINATION OF THIS COURT?

It will be observed that plaintiff in error is prosecuting this writ of error not in his individual capacity, but as auditor of Marion county, Indiana. The record does not disclose wherein his constitutional rights have been infringed or affected in any manner, nor does the record show that the plaintiff in error belongs to, or comes within, any of the classes of persons claimed to be injured or affected by the statute in question.

The case, as he presents it, is in the nature of a moot court question; there is no showing, in fact, that any citizen's rights are infringed or denied, except that it is averred in the return to the writ that they may be, or that it is possible to be; but it is nowhere averred that plaintiff belongs to a class that is in any way affected. It is not even averred that he is a tax payer, or a resident of the county, or of the United States. He brings this suit in the character of a sort of loco parentis for the whole state, a character we contend that is not warranted by the law.

This court will not listen to objections made to the constitutionality of a statute by a party whose rights it does not affect, and who has no interest in defeating it.

In Cooley's Constitutional Limitations, 6th ed., p. 196, the learned author says:

> "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. And a party who has assented to his property being taken under a statute can not afterwards object that the statute is in violation of a provision in the constitution designed for the protection of private property. The statute is assumed to be valid, until some one complains whose rights it invades."

In the case of Clark v. Kansas City, 176 U. S. 114, the above quotation from Cooley is quoted, and Mr. Justice McKenna, speaking for the court, on page 118, says:

> "We concur in this view, and it would be difficult to add anything to its expression."

In the case of Red River Valley Bank v. Craig, 181 U. S. 548, on page 557, the court say:

> "One of the amendments contained in the last statute, which provides a means for the enforcement of a lien by the sale of the whole premises in the case of repairs upon a building already covered by a mortgage, was probably passed because of the

above decision of the Dakota court, and we need not concern ourselves as to its validity, because the plaintiff in error does not occupy such a position as to enable it to raise that question, the whole building in this case having been erected subsequently to the mortgage. The same may be said as to any question which might upon other facts be raised because of the cutting off of an existing mortgage not yet due and the (claimed) impairment of the obligation of a contract by the sale of the premises under the provisions of the amended statute.

"The mortgage in this case was past due and had been foreclosed and the land sold in 1894, subject to the lien on the building provided by the statute then in existence. One who does not belong to the class that might be injured by a statute can not raise the question of its invalidity. Supervisors v. Stanley, 105 U. S. 305; Clark v. Kansas City, 176 U. S. 114, 118; Lampasas v. Bell, 180 U. S. 276, 283."

In the case of Texas and Pacific Railway v. Johnson, 151 U. S. 81, on page 98, Mr. Chief Justice Fuller, speaking for the court, says:

"Nor can jurisdiction be maintained on the ground that a right of immunity was claimed under the authority exercised by the receiver in virtue of the order of the circuit court of the United States, which right or immunity was denied, as in McNulta v. Lochridge, 141 U. S. 327. The judgment was in favor of the receiver and the writ of error is brought by the company, and it is well settled that the right or immunity must be one of the plaintiff in error and not of a third person only."

In the case of Ludeling v. Chaffe, 143 U. S. 301, on page 305, Mr. Justice Gray, speaking for the court, says:

> "In order to give this court jurisdiction of a writ of error to review a judgment of a state court against a right claimed under a statute of the United States, that right must be one of the plaintiff in error, and not of a third person only. Giles v. Little, 134 U. S. 645. The immunity or privilege of the assignee in bankruptcy from being cited in these proceedings could only be set up by the assignee himself, or by a person claiming under him, and not by a person claiming under a conveyance from the bankrupt before the bankruptcy."

In the case of Jones et al. v. Black et al., 48 Ala. 540, on page 543, the court say:

> "Nor will a court listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specially affect. An act of the legislature will be assumed to be valid, until someone complains whose rights it invades; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of constitutionality can be presented and sustained. Cooley, page 164; Dejarnette v. Haynes, 23 Miss. 600; Dorman v. The State, 34 Ala. 216, 249, and the cases cited.
>
> "A party who seeks to have an act of the legislature declared unconstitutional, must not only show that he is, or will be injured by it, but he must also show how and in what respect he is or

> will be injured and prejudiced by it. Injury will not be presumed; it must be shown."

In the case of Giles v. Little, 134 U. S. 645, on page 650, Mr. Justice Gray, speaking for the court, says:

> "But it is certain that they neither had nor claimed any interest in the title acquired by Miles under those judgments. It is well settled that, in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. Owings v. Norwood, 5 Branch. 344; Montgomery v. Hernandez, 12 Wheat. 129, 132; Henderson v. Tennessee, 10 How. 311; Hale v. Gaines, 22 How. 144, 160; Long v. Converse, 91 U. S. 105. The title set up by the defendants being that of a third person, in which they have no interest, the writ of error is dismissed for want of jurisdiction."

To the same effect are the cases of—

> Wellington, Petitioner, 16 Pick. 87;
> Gustavel v. State, 153 Ind. 613;
> City of Kansas City v. Union Pac. Ry. Co., 59 Kas. 427.

From the foregoing authorities, it seems clear that plaintiff in error has no right to prosecute his writ of error in this court, since he does not show that he has any just cause for complaint.

A MINISTERIAL OFFICER CAN NOT ADJUDGE A LAW UNCONSTITUTIONAL ON THE GROUND THAT IT MAY AFFECT THE RIGHTS OF OTHERS, AND REFUSE TO PERFORM HIS PLAIN DUTIES THEREUNDER, AND EXCUSE HIMSELF BY ATTACKING THE CONSTITUTIONALITY OF THE ACT.

The county auditor in the state of Indiana is a ministerial officer. The duties laid upon the auditor by the act in question are purely ministerial duties; they in no way affect his rights as an officer, and it was his duty to obey the legislative will. He had no right to question the legislative authority merely because the exercise of his functions might affect third parties in such a way as to be violative of the constitution.

It has been decided by numerous cases throughout this country that it is the duty of a ministerial officer to obey the law, and not to question it; that a ministerial officer is not vested with judicial authority, and clothed with the right to pass upon the constitutionality of an act that prescribes certain duties for him to perform. Especially is this true of a ministerial officer charged with collecting the revenues, as it is recognized that a speedy collection of the revenues for the purposes of government is all important, and that delays and confusion are always injurious to the welfare of the municipality.

In the case of People, ex rel., v. Salomon, 54 Ill. 39, on page 46, the court say:

> "To the law every man owes homage, 'the very least as needing its care, the greatest as not exempted from its power.' To allow a ministerial officer to decide upon the validity of a law would

be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is, subjection to the laws."

In the case of Commissioners of Franklin County v. State, ex rel., 24 Fla. 55, on page 63, the court say:

"The duty of the commissioners being merely to receive and keep in their official custody the returns, as indicated, such duty involves no consideration by them of the legality of the election held under their call, nor does it permit them to raise before us the question of such legality as a reason for not performing their stated functions; nor does its performance decide or conclude anything as to the legality of the election, but merely preserves the evidence of the actual result of the same as shown by the returns. The statute has not given, even if it could do so under our constitution, to them the power to decide any such question, nor is this a proceeding for us to decide it in, nor are the proper parties before us. As county commissioners they are not charged with the duty of raising the question in behalf of those who may have personal interests, which the enforcement of the nineteenth article of the constitution may affect. If they have such personal interests themselves, these interests do not attach to their official duties as commissioners, and can not be permitted to stand in the way of their performance. If there be any person in Franklin county whose personal interests the enforcement of such article affects, the county com-

missioners are not the tribunal authorized to pass upon either the validity of the act or the legality of its enforcement. The validity of such act, and of the proceedings thereunder, will be considered when parties having interests affected by either are before us."

In State v. Shakespeare, 41 La. Ann. 156, on page 166, the court say:

> "A government whose laws can be ignored by those whose duty it is to execute them is feeble, weak and inert, and is wanting in that vigor, strength and energy that will insure its perpetuity. The mayor and council of the city of New Orleans are the officers of a subordinate political corporation not only charged with municipal duties, but as a constituent part of the state government they owe allegiance and obedience to their sovereign, the state of Louisiana, whose majesty, dignity and power they must uphold and whose mandates they must obey. They can not defy the law, constitute themselves the judges of its constitutionality, and pronounce upon its validity when they are charged with its execution, in advance of the judicial tribunal, whose sole prerogative it is to pass upon its constitutionality. It is their duty to obey the law until the law has been declared null and void by the judicial department of the government."

In the case of Bassett v. Barbin, 11 La. Ann. 672, on page 673, the court say:

> "He has accepted the office with all the functions belonging to it by law; and he has no business to

question the validity of those legislative enactments which constitute his official rule of action."

In Steele, ex rel., v. Auditor, 47 La. Ann. 1679, on page 1696, the court say:

"In mandamus proceedings against a public officer, involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute, and the ministerial character of the duty he is charged to perform. After a careful investigation of the authorities, we feel fully confirmed in the correctness of the conclusions we arrived at in Nicholls, Governor, v. Shakespeare, Mayor, and other cases, to the effect that executive officers of the state government have no authority to decline the performance of purely ministerial duties, which are imposed upon them by a law, on the ground that it contravenes the constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so, the most inextricable confusion would inevitably result, and produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government. 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' The result of this conclusion is, that the respondents are

without right to urge the unconstitutionality of the concurrent resolution which is involved."

In the case of State, ex rel., v. Stevenson, 18 Neb. 416, on page 421, the court say:

"While it will not be denied that any citizen may invoke the provisions of the constitution, state or federal, for the assertion or protection of any of his rights, either of person, family, or property, yet it may well be doubted that the incumbent of a ministerial office, created by and whose current duties rest solely upon legislative authority, may invoke the provisions of the constitution as a justification of his refusal to discharge a plain statutory duty. Under our present system, lawsuits may be prosecuted or defended only by a real party in interest. Such party only has the right to make a record which will render the question litigated res adjudicata."

In State, ex rel., v. Douglas County, 18 Neb. 506, on page 508, the court say:

"The presumption is that the legislature has done its duty, and that an act passed by it is not in conflict with the constitution, and it is the duty of all ministerial officers to obey it until the act is declared invalid."

In the case of Smyth v. Titcomb, 31 Me. 272, on page 286, the court say:

"A public officer entrusted with the collection and disbursement of revenue, in any of the depart-

ments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He can not refuse to act, because others may question his right. The individuals to be affected, may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs; or may choose to contest the validity of the enactment, personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such officers."

In the case of Tremont School District v. Clark, 33 Me. 82, on page 483, the court say:

"The collector, having a warrant from competent authority, was bound to proceed under it. With the anterior proceedings he had no concern. An officer appointed to collect the public revenue must, ex necessitate rei, obey his warrant, and he will be protected in so doing. He holds in his hands the sinews of government, and neither his fears that individuals may be injured, nor his doubts about the validity of anterior proceedings, will excuse him. If individuals are injured, they have their remedy at law, or they may see fit to waive any injury they have received. The collector has no judicial power. He is only to know whether his warrant proceeds from competent authority."

In the case of Wright v. Kelly (Idaho), 43 Pac. 565, on page 567, the court say:

> "Mandamus is an appropriate remedy to be employed against delinquent tax collectors to enforce the performance of their duties; nor, in such cases, can the respondent, as a ministerial officer, object that the act of the legislature authorizing the tax is unconstitutional, since it is not within the province of such officers to determine the constitutionality of laws; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes fixing the rights of third persons, not parties to the suit."

In the case of State, ex rel., v. Buchanan, 24 W. Va. 362, on page 383, the court say:

> "The revenue is the life of the government; and it is necessary that there should be no delay in its collection. The machinery for its collection must be kept in motion and must not be stopped by assessors or other inferior officers for the purpose of testing the legality or illegality of a tax law. It is no concern of the assessor, as such, whether the tax is illegal or not."

In the case of Thoreson v. State Board of Examiners, 19 Utah 18, on page 31, the court say:

> "To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out and made their official duty, by a statute, on the ground that the performance of the act would violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities.

> It would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and can not in any event be made impossible. We are of the opinion that this ground of objection furnishes no excuse for the failure of the board to perform a plain ministerial duty prescribed by the governor and legislative assembly of the state, and that we are not authorized to pass upon the constitutional question so raised in a proceeding by mandamus."

What rules of action for ministerial officers could be more clear or founded on greater reasons than those above laid down?

But the foregoing cases arise where a ministerial officer has taken upon himself to adjudge a law unconstitutional in the absence of any interpretation by the highest court of his state.

What standing, then, can a ministerial officer have when he challenges a law that has been declared by the highest court of his state to be a constitutional and valid law?

In the case now before the court, as the record shows, the supreme court, in the original proceeding between the plaintiff in error and defendant in error, held the law constitutional and valid in every particular, and, after such judgment of the supreme court, plaintiff in error filed his return to the alternative writ, in which he again denied the constitutionality of the act, in the face of the decision of the supreme court, and it is upon this second

denial of the constitutionality of this law by this ministerial officer, that this cause is now before this court.

The decree of the supreme court was recognized and obeyed by the judge of the Marion circuit court, the judicial officer charged with the duty of first passing upon the constitutionality of the laws of this state, but this petty ministerial officer, whose duties and functions are purely statutory and subject to the legislative will, refuses to be bound by such a decree of the highest court, and still insists that he shall not perform the functions of the office, prescribed by the legislative and judicial mandate, not because any of his rights are affected or infringed, or because his property is taken without due process of law, but because, forsooth, some third person's property or personal rights may be injuriously affected if he performs the duties that the legislative and judicial departments of the state government have said he shall perform. If the act in question does abridge the rights of third persons there is time enough for this court to so declare when properly requested so to do.

The evils of permitting a ministerial officer to assume judicial authority and pass upon the constitutionality of a law prescribing his duties is strongly illustrated in this case. Here, the auditor is one of the important wheels in the machinery of the collection of revenues for sustaining the government. By refusing to obey the law in question he delayed and threw into confusion the collection of the taxes, state, county and city, of the richest county in the state.

We insist that under this state of facts the plaintiff in error has no standing in this court, and has no right to invoke the power of this court to aid him in refusing to obey the law enacted by the legislature, and decreed by the highest judicial body of his state to be a valid law for his guidance and authority.

It should be constantly borne in mind that this act has been approved by the supreme court of the state of Indiana, and that all questions as to uniformity and equality of assessment, and just valuation for taxation of property, have been fully settled, as far as the state of Indiana is concerned; that all questions as to whether any of the provisions of said act are repugnant to any provision of the constitution of the state of Indiana, have been determined and set at rest, and the only question before this court is whether said act, or any of its provisions are repugnant to the fourteenth amendment of the federal constitution.

Does said act, or either of its provisions, abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws? That is the question and the only question this court is called upon to decide.

By the enforcement of this law is any burden laid upon any citizen of the United States that is not laid upon citizens within the jurisdiction of the law, that are in similar circumstances and under the same conditions? Is any immunity given to any citizen that is not given to all citizens who are in similar circumstances and under like conditions?

These are, we take it, the only questions for this court to determine, and in determining the same it will perhaps be instructive to consider some of the other laws of the state of Indiana in relation to taxation.

Section 8410, Burns R. S. 1901, provides as follows:

> "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Section 8411 provides:

> "For the purpose of taxation, real property shall include all lands within the state and all buildings and fixtures thereon and appurtenances thereto excepting in cases otherwise expressly provided by law; personal property shall include all goods and chattels within the state, all ships, boats and vessels belonging to inhabitants of this state whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this state situate without this state, except the property actually and permanently invested in business in another state shall not be included; all indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the state; all shares in corporations organized under the laws of this state when the property of such corporation is not exempt or is not taxable to the corporation itself; all shares in banks organized in this state under any law of the United States, but in estimating the value of such

shares deduction shall be made of the value of all real estate taxed to the bank; all shares in foreign corporations except national banks, owned by inhabitants of this state; all moneys; all circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency; all annuities and royalties; all interests owned by individuals in lands, the fee of which is in this state or in the United States, except as hereinafter provided. Property exempted from taxation by the laws of the United States shall not be included. Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders. Lands sold by the state, including lands forfeited to the sinking fund, the university fund and all other trust funds though not granted or conveyed shall be assessed in the same manner as if actually conveyed. All lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation shall be liable to taxation from the time such treaty shall have been confirmed."

Section 8412 provides what property shall be exempt, and is as follows:

"The following property shall be exempt from taxation:

"First. The property of the United States and of this state.

"Second. The property of any county, city, town or township.

"Third. All lands granted for the use of the common schools, so long as the same shall remain unsold.

"Fourth. The personal property and real estate of every manual-labor school or college incorporated within this state when used or occupied for the purpose for which it was incorporated, such real estate not to exceed three hundred and twenty acres.

"Fifth. Every building used and set apart for educational, literary, scientific or charitable purposes by any institution, or by any individual or individuals, association or corporation, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situate; also the lands purchased with the bona fide intention of erecting buildings for such use thereon, not exceeding forty acres; also the personal property, endowment funds and interest thereon, belonging to any institution, town, township, city or county, and connected with, used or set apart for any of the purposes aforesaid.

"Sixth. Every building used for religious worship, and the pews and furniture within the same, and also the parsonage belonging thereto and occupied as such, and the land whereon said building or buildings are situate, not exceeding ten acres when owned by a church or religious society, or in trust for its use; also every cemetery."

Section 8414 provides for a rebate of the taxes upon property that has been destroyed, and is as follows:

"In all cases where buildings or personal property shall be destroyed, in whole or in part, by un-

> avoidable casualty, after being assessed for the year, and such loss is not covered by insurance, the county auditor shall, upon sworn proof of such loss, allow a rebate of such proportion of the taxes for that year as that part of the year which shall remain, after such destruction, bears to the whole year."

Section 1, Article X, of the constitution (see Burns R. S. 1901, Section 193) provides for the assessment of property, and is as follows:

> "The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

For the purposes of this case, and in this court, this law should be held to be in accord with the foregoing provisions of the constitution, and laws of the state of Indiana.

DOES THE ACT IN QUESTION ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, OR DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, OR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS?

Whether the act in question is an exemption law or a deduction law is not a pertinent inquiry here. Such question was presented to and decided by the only proper tribunal, the supreme court of the state, a decision this court

will respect even if plaintiff in error does not. What will amount to a violation of the fourteenth amendment of the federal constitution has never been precisely defined, and, from the nature of things, never can be; but this court has laid down some well established rules to be applied in determining the question as it relates to the facts and circumstances of each individual case.

In the case of Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, on page 292, Mr. Justice McKenna, speaking for the court, says:

> "This brings us to the law in controversy. The appellant attacks both its principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.
>
> "Is the act open to this criticism? The clause of the fourteenth amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax cases, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the

liabilities imposed. Hayes v. Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may safely be said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile county v. Kimball, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.'

"The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporaton than B, it may subject A to a different rule of responsibility to servants than B, Missouri Pacific Railway v. Mackey, 127 U. S. 205, to a different measure of damages than B, Minneapolis &

St. Louis Railway v. Beckwith, 129 U. S. 26, and it permits special legislation in all of its varieties. Missouri Pacific Railway v. Mackey, 127 U. S. 205; Minneapolis & St. Louis Railway v. Herrick, 127 U. S. 210; Duncan v. Missouri, 152 U. S. 377.

"In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The case of Bell's Gap Rd. Co. v. Pennsylvania, 134 U. S. 232, is a leading case upon this question, and is frequently cited in subsequent opinions of this court.

In that case, by the law of Pennsylvania, all moneyed securities were subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which were taxed at three mills on the dollar of their nominal or par value.

The railroad company objected to paying this tax upon the par value of its scrip, bonds and certificates of indebtedness, contending that said act was in violation of the fourteenth amendment of the federal constitution. On page 236, Mr. Justice Bradley, speaking for the court, says:

"AS TO THE ASSESSMENT OF THE TAX OF THREE MILLS UPON THE NOMINAL OR FACE VALUE OF THE BONDS, INSTEAD OF ASSESSING IT UPON THE ACTUAL VALUE.

This might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as part of the state system of taxation, authorized by its constitution and laws. Then, how does it

violate any provision of the constitution of the United States? It is contended that it violates the first section of the fourteenth amendment, which forbids a state to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

"But, be this as it may, the law does not make any discrimination in this regard which the state is not competent to make. All corporate securities are subject to the same regulation. The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable

> limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

Applying this decision to the facts in the case now before the court, it seems that very little is left to be said.

In the case of Pacific Express Company v. Seibert, 142 U. S. 339, Mr. Justice Lamar, speaking for the court, on page 351, says:

> "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the

> amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

The case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, presents a case very similar to the case at bar. This case was brought under a law that provided that in case banks or savings institutions in the state of Pennsylvania should elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of the shares, and should pay them into the state treasury on or before the first day of March of each year, so much of the capital and profits of such bank as was not invested in real estate should be exempt from local taxation; but, in case such bank or savings institution did not elect to so collect and pay its taxes, its shares should be assessed and taxes collected thereon at their actual value, and it was contended that this act violated the fourteenth amendment of the federal constitution on account of its lack of uniformity, and, upon this point, Mr. Justice Brewer, speaking for the court, on page 463, says:

> "If it be said that a lack of uniformity renders the statute obnoxious to that part of the fourteenth

amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the federal constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent. in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the federal constitution.

> "Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety *of such inducement*, we need look no further than the present litigation. It is common practice in the states to offer a discount for payment before the specified time, and impose penalties for non-payment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all. It was well said by Mr. Justice Williams, speaking for the supreme court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.' "

This opinion, it seems to us, effectually answers the argument of plaintiff in error that by reason of the deduction of mortgage indebtedness in the state of Indiana, other property is compelled to bear more than its share of the public burdens.

In the case of Clark v. Kansas City, 176 U. S. 114, heretofore cited, Mr. Justice McKenna, speaking for the court, on page 119, says:

> "The reasoning of the cases we need not repeat. It is enough to say that the rule of the constitution leaves to the discretion and wisdom of the state a

> wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations."

That the act in question does not violate the constitutional rule of uniformity in taxation and method of assessing for the purpose of the same, is so ably argued in the majority opinion on the petition for rehearing in this cause, in the supreme court of Indiana, that we here present it, quoting from page 579 of the opinion, being page 34 of the record:

> "The authorities are against appellee on the subject of classification. In addition to the authorities cited in the principal opinion, we cite Edwards v. People, 88 Ill. 340, 347, and People v. Barker, 155 N. Y. 330, 332, 49 N. E. 940. In the former case the supreme court of Illinois said: 'It is also objected, that the revenue law is unconstitutional, because the method of assessing is not uniform. The fact that certain credits and deductions may be allowed in the assessment of personal property, does not establish a want of uniformity. Where a law operates alike upon all persons and property like situated, it may be regarded as uniform. This, as we understand our revenue law, is its practical operation. Perfect equality in taxation is a problem of difficult solution.' In the New York case the court of appeals reached the same conclusion, but upon a somewhat different course of reasoning. The

court said: 'The right to have debts deducted from the value of taxable property is not an absolute one, but in the nature of a favor. The state may grant or withhold it at pleasure. It was in the power of the state to tax all the property the relator had without providing for any deduction on account of debts. It can not, therefore, be said that a law which permits the deductions as to certain debts and forbids it as to other debts, violates any constitutional provision.'

"On the subject of classification it is not difficult to accumulate extreme statements made by courts in the condemnation of statutes that so offend, but it materially conduces to a more intelligent understanding of the effect of such decisions if such statements are read in connection with the enactments they condemn. But if we may venture to attempt to extract the cardinal principle from the many discordant opinions upon the subject of classification, we may say that it will be found that what they condemn is a classification that is arbitrary, because it is not founded on differences recognized by the constitution, or naturally inhering in the subject-matter of the legislation to an extent that would at least suggest some reason why the law-making power, acting in a presumed spirit of fairness, should have made the distinction. As stated before, we perceive in the statute under consideration a substantial reason for distinguishing between mortgages or defeasible sales and mere liens. And there is also a substantial reason for not permitting such deductions from personal property generally, since it is a fact, so well known as to be judicially

> recognized, that real estate bears more than its proportion of the burdens imposed by the state government."

The law applies equally to all persons who own real estate upon which there is a mortgage to secure a debt owed by the owner. There is no arbitrary class to which it applies; it does not exclude any one under like conditions or circumstances. As is so concisely stated in the opinion of the supreme court of Indiana in this case (see Opinion, p. 550, and page 15 of the record):

> "As to the requirement of uniformity, we have to say that the act in question purports to be a law that is uniform throughout the state, and, as it permits all persons to take advantage of it when their circumstances bring them within its operation, we are of the opinion that it does not violate that requirement of the constitution. Cleveland, etc., R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Gilson v. Board, etc., 128 Ind. 65, 11 L. R. A. 835."

Counsel argue at great length and with much ingeniousness that we have no property deductions in this state; that what is called a deduction of debts owning from credits owing to the person taxed, is not a deduction, but simply a taxation upon the net balance due the person sought to be taxed upon the debts owing to him, and counsel cite section 8411 Burns' R. S. 1901, in proof of this proposition. That portion of the said section relating to this proposition is as follows:

> "All indebtedness due to inhabitants of this state above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the state."

The argument of counsel on this proposition seems to be a vigorous argument on the difference between twiddledee-dum and twiddledee-dec. By whatever name it may be called, there is a deduction of indebtedness owing from indebtedness due. The same legislature that enacted the last above quotation, in the same act also provided the form of schedule that should be used by the assessors in listing the property of the different individuals in the state. This schedule is so expressive of what was intended by the above quoted portion of the act that we here insert a copy of it, just as it is found in the act:

PERSONAL PROPERTY—CREDITS.

Number.	Description of Property.	Valuation by party.	Valuation by assessor.
1	All annuities	$...	$.....
2	All bonds	....	.....
3	All notes secured by mortgage	....	.....
4	All other notes	....	.....
5	All accounts	....	.....
6	All other amounts due me from any person, firm or corporation, except for moneys deposited with banks, corporations, firms or individuals	....	.....
	Total credits due me	$...	$.....
	From the sum of the above credits I claim a deduction of the amounts of my bona fide indebtedness, as follows: Value of all notes owing by me		

Name of Payee.	Date of Maturity.	Amount.
.....	.....	$...
.....	.....	....
.....	.....	....
.....	.....	....
Value of accounts owing by me		....
Total bona fide indebtedness which should be deducted from my credits		....
Leaving balance for which I should be assessed		....

Burns R. S. 1901, sec. 8463.

It will be seen from this schedule that the person making the list shall first enumerate and describe his credits, and

give the total of the same. Following this he must give the names and date of maturity and amounts of indebtedness owing to him under the heading: "From the sum of the above credits I claim a deduction of the amounts of my bona fide indebtedness, as follows." After the account of the debts owing to him, and the value given, follows the statement: "Total bona fide indebtedness which should be deducted from my credits, leaving balance for which I should be assessed."

So, it is evident that the legislature in enacting the clause fully understood and intended that in the assessment of credits due, there should be deducted therefrom the amounts owing by such tax payer, and this is the substantial result, by whatever name it may be called. This law has been upheld and is in force and enforced in the state, and has been ever since the passage of the said act.

It was by reason of the fact that the tax payer who had his money invested in notes, bonds and accounts, and who also had debts, only paid upon the net value of his property, while the real estate owner, who had his money invested in real estate and his debts secured by a mortgage on such real estate, paid upon the gross valuation of his property, and was unable to deduct his debts, that brought about the demand for the enactment of the law in question.

The full text of the act involved in this case we here insert for the information of the court:

AN ACT concerning the taxation of real estate encumbered by a mortgage, and declaring an emergency.

[S. 17. LAW WITHOUT GOVERNOR'S SIGNATURE, MARCH 4, 1899.]

Section 1. Be it enacted by the General Assembly of the state of Indiana, That any person being the owner of real estate liable for taxation within the state of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year: Provided, That no deduction shall be allowed greater than one-half of such assessed valuation of said real estate.

Sec. 2. Any person desiring to avail himself, or herself of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or bona fide owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

Sec. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the state of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

Sec. 4. Any person who shall wilfully make a false statement of the facts provided for in section 2 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty nor more than five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

Acts 1899, p. 422.

That there may inequalities arise under this act we will admit, but this is true of every act enacted for the purpose of raising revenues. It has often been held that absolute equality in taxation is unattainable and impossible, under our present conditions, and what has been said about inequalities of this act could at least, in a measure, be said of every taxation act.

Is it a vicious act? Does it not, on the contrary, tend to equality and justice, under the system of taxation that obtains in the state of Indiana?

Suppose, for illustration, three persons—A, B and C.

A is worth $1,400, invested in real estate, and has no debts. B is worth $1,400, but has $2,100 invested in debts due and owing to him, but owes $700 on a note to a non-resident. C is worth $1,400, but has it invested in real estate of the value of $2,100, on which he owes $700 to a resident of the state, and which is secured by mortgage upon his said real estate.

Prior to the passage of the act under discussion, A would pay taxes on $1,400, the valuation of his real estate, the same being his net worth, and in proportion to his ability to pay. B would deduct his debt of $700 from what was owing to him, and pay his taxes on his net worth, or $1,400, the same being in proportion to his ability to pay. C would pay on the valuation of his real estate, or $2,100, or $700 more than his net worth, and, consequently, more in proportion to his abiltiy to pay than A or B. The holder of C's note would pay taxes on $700, the valuation of this note, provided it was divulged to the assessing officer; so this real estate for assessment purposes would represent $2,800, or $700 more than it was actually worth.

Now, under the act in question, A would pay taxes on $1,400, or his net worth. B, on his $1,400, or his net worth. C deducts the amount of his mortgage, and pays on $1,400, or on his net worth. Each has paid his proportion of the taxes, and in proportion to his ability to pay, and the amount deducted by C is paid on by the holder of C's note.

Which system is the more equitable? The question answers itself.

But counsel say that there are thousands of dollars loaned and secured by mortgages throughout the state by the state out of the school fund, and by non-residents and benevolent institutions, which pay no taxes. Is this any reason why the poor home owner, who has his home only one-half or two-thirds paid for, should make up such deficit or pay such taxes? Is it not more inequitable that the persons who are burdened with a mortgage on their real estate should bear the whole burden of this untaxable property than if it were apportioned to all the tax payers of the state?

In the dissenting opinion rendered in this case in the supreme court of the state the illustration is given of two lots valued at $1,400 each, one being incumbered with a mortgage for $700, and the other unincumbered.

On the first lot the owner is required to pay taxes on $700 only; on the second the owner is required to pay taxes on $1,400, and, referring to this situation, the learned judge says:

> "Call it what we may, the owner of the first lot enjoys an immunity which is denied to his less fortunate neighbors."

This is the first judicial expression that we have been able to discover that for a man to have a mortgage of $700 on a $1,400 lot was a fortunate circumstance, or that it was a situation to be desired.

I doubt very much if the one who had no mortgage would be willing to exchange places with what is denom-

inated his more fortunate neighbor—the one who has a mortgage of $700 on his lot.

But, it is contended that taxes are not debts. This is true in the broad general sense, that they are subject of legal suit, judgment and execution; but they are as surely liabilities that are enforceable against the owner, as any other obligation. The difference is that in an ordinary debt, suit may be maintained in our courts for collection, while taxes may not be so enforced, for the reason that they are obligations of statutory creation, and a full mode and manner is provided for the enforcement of their collection.

This is clearly expressed in the case of Gallup, Executor, v. Schmidt, Treas., 154 Ind. 196. On page 215, speaking to this point, the court say:

> "A tax is not an ordinary debt. It is not founded upon contract, express or implied. It flows from the exercise of sovereign power, and is imposed without the consent of the debtor. It is enforceable summarily, by distress and sale, and without exemption or relief from valuation laws. The right to assess property and levy taxes thereon is given by legislative enactment, upon such limitations and conditions as are imposed by the constitution."

The exact nature of the obligation or liability of taxes, when assessed against lands, is clearly set out in the case of Thompson v. McCorkle, 136 Ind. 484. On page 501, speaking to this point, the court say:

> "In answer to this we quote from Blackwell on Tax Titles (3d ed.), p. 547: 'In those states where

the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem., the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion, and remainder. In such case, the tax law itself is notice to the whole world of the liability of the land for all public assessments. * * * On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate—provides for a personal demand of the tax—and in case of default authorizes the seizure of the body or the goods of the delinquent, in satisfaction of the tax—and in terms, or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted—then, the sale and conveyance by the officer, passes only the interest of him in whose name it was listed—upon whom the demand was made—who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover, in ejectment, only such interest as he may prove to have been vested in the defaulter at the time of the assessment. Any other construction of laws containing such provisions, would be in violation of the spirit which moved the legislature to enact them, and be the means of depriving innocent persons of their estates.'

"Our law requires the land to be listed in the name of the owner. Section 6378—a personal demand of the tax. Section 6427 authorizes the per-

sonalty to be first sold. Sections 6447, 6429—and the realty can not be sold as long as there is personalty to pay the tax."

Under our laws, taxes assessed on real estate are personal liabilities of the owner; that is, they may be collected by distress and sale of the personal property of the owner.

By section 8431, Burns' R. S. 1901, it is provided that all lands shall be assessed to the owner, if known.

Section 8571 provides for a demand and levy on personal property.

Section 8590 provides that all taxes, real and personal, shall be a lien on the real estate of the owner.

Section 8591 provides that all property, real and personal, shall be liable for all taxes of the owner.

Section 8603 provides that lands when put up to be sold for taxes, shall sell for the full amount of all taxes against the land, and also against the owner, and it has been decided by our supreme court in numerous cases, that land can not be legally sold for taxes when the owner owns leviable personal property within the county sufficient to pay the taxes assessed against him.

See

Abbott, Aud., et al. v. Edgerton, 53 Ind. 196; and cases cited.

So that, taxes assessed on lands are in reality assessed against the owner, and his whole property is bound to pay the same.

But it is urged that the act in question discriminates against other liens against real estate. It seems evident that mortgages are more than naked liens. As is said in the opinion in this case in the supreme court of the state on page 552:

> "While it is true that for most purposes a mortgage will be treated as a mere security for a debt, yet whenever it is necessary to render effective the rights of the parties, the courts still treat mortgages as forms of defeasible sales."

In the case of Savings Society v. Multnomah County, 169 U. S. 421, on page 428, Mr. Justice Gray, speaking for the court, says:

> "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate."

Again, citing from an opinion of Mr. Justice Strong, of the supreme court of Pennsylvania, the same justice, in the same opinion, on page 429, says:

> "They are in form defeasible sales and, in substance, grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its incidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to ren-

> der it effective as a security, there is always a recognition of the fact that it is a transfer of the title."

But with this matter this court has no concern; that is a matter left wholly with the state courts. But it is contended by plaintiff in error that the act is vicious because it provides an arbitrary amount that may be deducted; that is, not more than one-half the appraised value of the land, to an amount not to exceed $700.

Whose rights does this injuriously affect? Not the one who has unincumbered real estate, nor the one that has only personal property, for the limitation protects him, pro tanto. The only one in any way affected is the one sought to be benefited, and he certainly will not resist the law, for in so doing the morsel that has been given him will be taken away.

As is said in the majority opinion, on the petition for a rehearing in this case, on page 581 of the opinion, and page 34 of the record:

> "The provision that not more than one-half of the assessed value of the property shall be allowed as a deduction is not arbitrary, although some mortgagors may gain a greater benefit from the law than others. There is a basis in reason for such requirement, in that a wise public policy is conserved by an enactment that, even if it releases a property owner from a part of the burden of taxation, still leaves him some portion of such burden, because his vote or influence is by that consideration likely to be cast on the side of holding public officers to due

> economy in the administration of public affairs. In Cooley on Taxation, p. 170, it is said: 'Even within the class taxed, however, there may be rules of distinction; and these are perfectly admissible, provided they are general rules and are observed.' "

Again, it is said that it creates new assessment officers. We do not think this is the case, for as a matter of fact the auditor of a county in Indiana, under the laws of that state, is an assessing officer, and performs a very important part in the assessment and collection of taxes. He prepares and furnishes the assessors with their books and blanks; compels the banks to make statements of their property, and enters the valuations on such statements; lists all omitted property that comes to his knowledge. He is the secretary and member of the county board of review; makes up the tax duplicates, and performs many other duties in the assessment and collection of the taxes of the state.

It is also objected that there is no provision in the act in question for the listing and assessment of the notes secured by mortgage on which deduction is had. As to nonresidents, this is true, but as to notes held by residents of the state, the case is wholly different. Sec. 3 of the said act provides as follows:

> "Sec. 3. The county auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the state of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the auditor of the county

wherein the mortgagee, assignee, or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

And by the provisions of section 8560, Burns' R. S. 1901, it is made the duty of the auditor to list all property for taxation that comes to his knowledge, that has not been listed. And by section 8531, Burns' R. S. 1901, it is expressly made the duty of the county assessor to look after just such property as this. This section is as follows:

"As soon as such county assessor has qualified, he shall receive from the county auditor all returns of real and personal property made by the assessors of the several townships of the county, together with all assessment lists, schedules, statements, maps, and other books and papers filed with the auditor by said township assessors. It shall be the duty of such county assessor to make a careful examination of the tax duplicate of the county, and also of all other records and papers in the offices of the county auditor, treasurer, recorder, clerk, sheriff and surveyor, and to list and assess, at its true cash value, upon the proper township assessor's books and to the proper persons, all omitted assessable property, of every kind and nature whatsoever, including tax certificates, mortgages, debts, judgments, claims and allowances of courts and legacies and property in the hands of administrators, executors, guardians, assignees, receivers, trustees, and other fiduciaries. The valuation made on any omitted property by the county assessor shall be

entered in a separate column under the head of 'valuation by county assessor' immediately after the column containing the valuation by the township assessor in the several lists and returns of said township assessors. The county assessor shall have all the rights and powers given by law to township assessors for the examination of persons and property, and the discovery and assessment of property, and making lists and returns of the same. He shall on or before the first Monday after the 4th day of July in each year, make returns to the county auditor of all township assessor's books, returns, lists, schedules, maps, and other papers received by him from the auditor, together with such additional lists, assessments, books and papers as he has made thereto; and all assessments so made by the county assessor shall have the same force and effect as if made in the first instance by the township assessor. It shall also be the duty of the county assessor, at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; and the same shall be placed upon the duplicate by the auditor, and the taxes thereon extended and collected as in other cases. The county assessor is hereby authorized and required to advise and instruct all township assessors of his county as to their duties under the law, and for this purpose he shall visit each township assessor during the months of April or May in each year. The county assessor is also given all the powers hereinafter given to county auditors and treasurers as to assessment of omitted property after

> the meeting and adjournment of the board of county review in each year, and all provisions of sections 142 and 182 of this act, as to notice or otherwise so far as applicable, shall apply to such assessment by the county assessor as if the same were made by the county auditor or the county treasurer."

The act in question is only one of many that go to make up the complete system of taxation for the state, and when enacted all its provisions and duties attach themselves to all the taxing officers to which they extend. It may be "sporadic" but it nevertheless is firmly cemented into the body of the system of taxation of the state of Indiana, and a component part thereof.

That the county assessors and auditors have availed themselves of the information furnished by the provisions of this act is clearly evidenced by the tax returns. Plaintiff in error would have this court believe that the state of Indiana was in danger of being bankrupted by this act; that by reason of its enforcement the amount of taxables has been so reduced that the rates of taxation have been greatly increased.

The facts, however, do not bear out this assertion. The records of the auditor of state's office show that the total amount of taxable property in the state of Indiana in 1898, the year prior to the enactment of this law, was $1,311,411,483; that for the year 1899, the year the law was enacted, and before the county assessors were able to fully inform themselves from these affidavits and statements of

mortgages that were sequestered, the total assessed valuation of the taxables of the state was $1,337,746,698. The deductions under the act in question amounted to $27,500,000, leaving a net amount of valuation of taxables of $1,310,246,698, or, in round numbers, one million dollars less than the total amount of taxables in 1898.

In the year 1900, after the county assessors and auditors had opportunities to investigate these affidavits, and statements of mortgages and to list those that had been sequestered, the valuation of the state rose to $1,360,445,139. The amount deducted for mortgages was $34,389,394; leaving a net total amount of valuation of taxables in the state of $1,326,055,245, or an increase of over fifteen millions of dollars over 1898.

For the year 1901 the total amount of taxables as returned to the auditor of state was $1,397,981,497. The total amount of mortgage exemption, $35,169,250, leaving a net total of valuation of taxables of $1,362,812,247, or, in round numbers, fifty-one millions more than in 1898, or thirty-six millions more than in the year 1900.

The amounts have not been made up, and we are unable to give them for the years 1902 and 1903, but these illustrate that this court can not say that any one's rights are injuriously affected by this law; that, while $700 from the mortgage indebtedness may be deducted from the assessed value of the land, it discloses to the taxing officers a mortgage that may be many times more than $700, that has heretofore escaped taxation, and the results show that there has not been any appreciable reduction of the taxables

of the state, and this court would have to enter into the field of speculation to say that the rights and immunities of any citizen was abridged or that his property was taken without due process of law.

We contend, and some of the taxing officers of the state department believe and assert that this law has swelled the sum total of taxables on the assessment rolls of the state, instead of having reduced them.

Can this court say as a matter of law that increased burdens are placed upon some by reason of their being taken from others under this state of facts? And yet that is what the plaintiff in error in this case is asking this court to do.

The argument of this question strongly presents the force of our argument as to the right of this plaintiff in error to raise this question. Who does he represent? Who does he claim will be injuriously affected? Is it the holder of the mortgage, whose property has been uncovered by some affidavit of some poor home owner; or, is it the poor home owner, who has been relieved of taxes on $700 assessed against the property that he owns? Who is asserting that his rights are injuriously affected?

The plaintiff in error asserts that he brings his suit, or makes his return in this suit, as the auditor of Marion county. Then does the plaintiff in error contend that the act is repugnant to the fourteenth amendment of the federal constitution, because it abridges the rights and immunities, or denies the equal protection of the laws to the county auditors of the state?

These are all pertinent inquiries, it seems to us, in passing upon this question.

The great majority of the cases cited and propositions advanced in the brief for plaintiff in error are propositions that are properly raised and decided by the state courts under the particular provisions of the different state constitutions; but, as we have contended, and have demonstrated by the authorities, these are questions that are not before this court, but are questions that must be settled by the state courts.

It would be repugnant to the constitution of the state of Indiana to exempt any property except what is specifically enumerated in the constitution, from taxation, it is true, but whether such property has been exempted is a matter for the state court to decide, and such decision, under the rules of this court, would be controlling, unless there was a gross or flagrant abuse of power, or a glaring erroneous judgment.

So, in this case, the defendant in error contends that the plaintiff in error, under the circumstances of this case, has no standing in this court to raise a question upon the constitutionality of this act, as being repugnant to the fourteenth amendment of the federal constitution.

That all questions of exemption or deduction of proper or just valuation, and kindred subjects, in so far as they relate to the constitution of the state of Indiana, have been decided, and that decision is a controlling one with this court.

That the act comes within the rules laid down by numerous decisions of this court, providing for uniformity, classi-

fication and equality, required by the fourteenth amendment of the federal constitution.

And that the act does not abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

And we ask that the ruling of the supreme court of the state of Indiana, upon the questions involved, be affirmed.

Respectfully submitted,

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